IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|---|---|---|
| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>JEFFREY ALLEN HINES,<br><br>Petitioner. | ) | 2 CA-CR 2006-0333-PR<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20012523

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

---

Robert J. Hooker, Pima County Public Defender
By Nancy F. Jones
Tucson
Attorneys for Petitioner

---

E S P I N O S A, Judge.

**¶1** Pursuant to a plea agreement, petitioner Jeffrey Hines was convicted in CR-20017151 of aggravated assault of a police officer, a class five felony, and in CR-20012523 of attempted sexual conduct with a minor under the age of fifteen, a class three felony and a dangerous crime against children. The trial court sentenced Hines in

January 2002, to a mitigated, one-year prison term for aggravated assault, to be followed by a twenty-five-year term of probation for sexual conduct with a minor. In this petition for review, Hines challenges the trial court's refusal of his request in his post-conviction proceeding to reduce the ten-year prison term for attempted sexual conduct with a minor, which the court imposed after Hines admitted violating conditions of his probation and the court revoked his probation. We will not disturb the trial court's ruling on Hines's petition for post-conviction relief unless we can conclude the court abused its discretion. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). We can reach no such conclusion.

**¶2** In March 2003, Hines admitted one of three allegations in the petition to revoke probation that had been filed in February. The court continued him on probation and imposed additional conditions. In April 2003, the probation department filed a second petition to revoke probation. In June 2005, Hines admitted he had violated his probation conditions by changing his residence without the approval of his probation officer and failing to report to the probation officer as directed. Just before Hines admitted these allegations, the trial court stated: "The maximum time is 8.75 years, is that correct? The wors[t] you can do is 8.75 years."

**¶3** At the disposition hearing in July, the prosecutor stated that the sentencing range for the offense was five to fifteen years' imprisonment. Urging the court to impose the minimum prison term of five years if a prison term were imposed, defense counsel conceded

the range was five to fifteen years but noted that the court had stated at the violation hearing that "8.75 [years] was the most he could get." Counsel explained why he previously had thought the court had been correct when it had stated at the June violation hearing that the maximum term was 8.75 years. The court then asked: "Didn't [Hines] plead to 5 to 15?" Defense counsel agreed that he had, but Hines stated that he could not recall and that "[a]t this point it doesn't matter." He added, *inter alia*: "What matters to me is that that young little girl, that she's doing better and she's doing good." The court replied: "The sentencing range is 5 to 15[, which was] in the plea agreement. That's what you're facing, not the 8.75."

**¶4** Hines further expressed his remorse, and the trial court imposed the ten-year, presumptive term of imprisonment. Hines sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., claiming the court's misstatement about the maximum prison term was essentially a promise, one that he was entitled to rely on as if it had been a promise by the state to induce him to admit certain allegations in the petition to revoke probation. He argued that, consequently, his due process rights had been violated and the appropriate remedy was specific performance, i.e., a reduction of his sentence to 8.75 years. At a status conference in July 2006, which Hines attended telephonically, the parties argued the merits of the post-conviction petition. The trial court commented: "I can't specifically enforce something that was incorrectly stated." At the end of the hearing, the court agreed Hines had been misinformed but stated that "[t]he appropriate remedy is he can withdraw from the

admissions and start over again." The court reset the matter for another hearing to give counsel time to discuss with Hines whether he would like to withdraw his admissions, but counsel subsequently filed a motion asking to vacate that hearing because Hines "no longer wishe[d] to withdraw his admissions to the allegations contained in the Petition to Revoke Probation."

**¶5** In his petition for review, Hines reiterates his argument that, in deciding to admit he had violated conditions of probation, he had relied on the court's statement that, at most, he was facing a prison term of 8.75 years. He contends he was entitled to specific performance of what, in effect, became an agreement about his sentence and asserts the trial court erroneously concluded the only remedy available was to permit him to withdraw his admissions and begin the process anew. Hines argues any other remedy is inadequate because, by the time he filed the petition for post-conviction relief and, certainly, the petition for review, his probation had been revoked, and he was already serving a prison term. Hines has not established the court abused its discretion in rejecting his claim.

**¶6** Regardless of whether the court was correct that the remedy of specific performance was not appropriate, the court did not abuse its discretion in denying post-conviction relief. A defendant is precluded from obtaining post-conviction "relief . . . based upon any ground . . . [t]hat has been waived at trial." Ariz. R. Crim. P. 32.2(a)(3). Hines waived the claim by failing to assert it as soon as the error came to light, which was at the disposition hearing, held just a few weeks after the violation hearing. Once Hines was

informed of the correct sentencing range, which, incidentally, was contained in the plea agreement and presumably was pointed out to him during the change-of-plea proceeding, Hines made no objection. At that point, he could have made it clear that, as he asserts in this proceeding, his belief that the maximum prison term he could face was 8.75 years had been material to his decision to admit he had violated conditions of probation. He did not do so, and, indeed, his statements to the court made it clear that the discrepancy made no difference. Had Hines objected at that point, he could have avoided what he now claims renders inadequate any remedy but specific performance: the fact that he is serving a prison term after his probation was revoked.

**¶7** Additionally, although the court implicitly found Hines had relied on its statement about the maximum sentence, we do not think the record supports such a finding.[1] The trial court had completed a litany of questions during the violation hearing that established Hines wanted to admit he had violated probation conditions after conferring with counsel and no one had made any promises to him in exchange for the admissions. The statement about the 8.75-year prison term was the last thing the court said to Hines before he admitted the violations. Consequently, this case is indistinguishable from this court's decision in *State v. Butler*, 125 Ariz. 289, 609 P.2d 104 (App. 1980).

[1]Hines states in his petition for review that "[t]he trial court found that [he] had relied upon its erroneous statement." The court did not make such an express finding. Rather, such a finding is implicit in the fact that the court proceeded to address the remedy after defense counsel stated Hines had relied on the court's statement.

**¶8** In *Butler*, as in this case, the trial court had incorrectly informed the defendant at the violation hearing of the sentence he faced should the court revoke his probation. *Id*. at 290, 125 P.2d at 105. The court informed the defendant he could be ordered to serve up to six months in jail for joyriding; the correct term was one year, which the court imposed after revoking probation. *Id*. This court held that because Rule 27.8(e), Ariz. R. Crim. P., 17 A.R.S., did not require the trial court "to inform appellant of the possible length of the sentence should his probation be revoked, we do not believe that the misinformation given to appellant calls for setting aside the sentence and his admission absent a showing that the misinformation induced his admission." *Id*. Finding there had been no such showing, this court affirmed the sentence. *Id*. Because the record here does not establish the misinformation induced Hines to admit the allegations of the petition to revoke probation, he similarly is not entitled to relief from his sentence.

**¶9** In any event, even assuming the court found that Hines had relied on the misinformation and that the finding was supported by the record, the trial court did not abuse its discretion in denying Hines the remedy he requested. Compelling the court to sentence Hines to what would be a mitigated prison term because of an error such as this would divest the court of its sentencing discretion. It would result in the mandatory imposition of a mitigated term that the court apparently did not find warranted under the circumstances. Such a sentence would be illegal or unlawfully imposed. *See* A.R.S. § 13-702(B) (permitting court to impose, *inter alia*, "lower" prison term within statutory range

only if court finds factors offered in mitigation are true); *see also State v. Harrison*, 195 Ariz. 1, ¶ 12, 985 P.2d 486, 489 (1999) (sentencing judge must substantially comply with statute requiring court to set forth aggravating or mitigating circumstances on record when imposing anything but presumptive prison term; error in this regard not subject to harmless error review); *State v. Dowd*, 139 Ariz. 542, 543-44, 679 P.2d 565, 566-67 (App. 1984) (noting that § 13-702(C) requires court to state specific reasons when imposing anything but presumptive prison term; acknowledging "judge can mitigate a sentence" but "must be conscious of the reasons for doing so and must articulate them . . . even where the sentence is stipulated to in the plea agreement").

**¶10** Hines has relied extensively on *State v. Hays*, 112 Ariz. 4, 536 P.2d 692 (1975), both below and on review. Not only is *Hays* distinguishable, but it supports the trial court's conclusion that the appropriate remedy here was to permit Hines to withdraw his admissions. In *Hays*, the trial judge had promised the defendant that although the judge considered a prison term of five years to life imprisonment for voluntary manslaughter appropriate, if, by the time of sentencing, the judge thought the defendant should be sentenced to a longer term, the judge would allow the defendant to withdraw his guilty plea and the case would be assigned to another judge. *Id*. at 5, 536 P.2d at 693. The trial judge sentenced the defendant to twenty-five years to life, and the defendant moved to set aside the guilty plea in a petition filed thirteen months after the defendant had been sentenced. *Id*. at 5-6, 536 P.2d at 693-94. The trial judge denied the request, finding the defendant had

made "no effort to withdraw his guilty plea before or after sentencing." *Id*. at 6, 536 P.2d at 694.

**¶11** Reversing the conviction, the supreme court first found the record did not support the trial judge's finding that the defendant had made no effort to have his guilty plea set aside before or after sentencing. *Id*. "From the day of sentence the defendant repeatedly attempted to take advantage of the promise made to him by the judge through his counsel. Appellant did all that he was able to do under the circumstances." *Id*. In this case, although Hines timely sought post-conviction relief, he said nothing when it would have been most propitious, when the issue first came to light and was specifically addressed by the court and the parties. In fact, he all but characterized the information as insignificant.

**¶12** The impropriety of the trial judge's conduct in *Hays* was patent. As the supreme court pointed out, the trial judge had accepted the defendant's guilty plea knowing he had made a promise to the defendant that was not contained in the plea agreement. *Id*.

The supreme court held the defendant "was entitled to rely on [promises made by the court] much the same as a prosecutor is bound to the bargains he strikes with a defendant in the settling of pleas." *Id*. Here, the court's error was entirely inadvertent; indeed, defense counsel had thought the court was correct. The court thought it was simply informing Hines of the correct sentencing range and the potential consequences of his admissions, which Hines had already been told about when he initially pled guilty to the charge. In contrast

to *Hays*, here, the court made no promise. It misinformed Hines, but it did not make him a promise and induce his admissions.[2]

**¶13** Finally, the relief the defendant sought but was denied in *Hays* is precisely the remedy the trial court offered to Hines. The relief sought there would not have resulted in the imposition of an illegal sentence as the remedy requested here arguably would. The remedy the trial court offered here has repeatedly been found appropriate when a defendant has been misinformed before entering a guilty plea. *See State v. Cutler*, 121 Ariz. 328, 330, 590 P.2d 444, 446 (1979) (defendant entitled to withdraw guilty plea because court did not tell him he could be required to serve one-year jail term as a condition of probation); *State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982) (defendant entitled to withdraw guilty plea entered because he mistakenly believed he would receive lesser sentence than that which he received); *see also Coy v. Fields*, 200 Ariz. 442, ¶ 7, 27 P.3d 799, 801-02 (App. 2001) (acknowledging that when plea agreements provide for illegally lenient sentence, "courts generally either vacate the plea or give the defendant the option of

---

[2]We acknowledge that *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543 (1984), and *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495 (1971), support the notion that specific performance may be a permissible remedy for the breach of a plea agreement. But that remedy is derived from principles of contract law and presupposes that there is an agreement of some form or another, albeit one that has been accepted by a court. *See In re Timothy M.*, 197 Ariz. 394, ¶¶ 12-13, 4 P.3d 449, 452 (App. 2000); *see also Coy v. Fields*, 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001) ("Plea agreements are contractual in nature and subject to contract interpretation."). The trial court made no promise to Hines that can be viewed as an agreement that induced his admissions. Rather, it was a misstatement of the law that arguably could have affected the validity of the admissions and, consequently, could have been a ground for vacating the admissions.

withdrawing from the plea or agreeing to a legal sentence in excess of the agreement's provisions").

**¶14** Hines has not sustained his burden of establishing the trial court abused its discretion in denying post-conviction relief. Therefore, we grant the petition for review but deny relief.

_____
PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge